Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Petitioners,

v.

CITY OF CRYSTAL LAKE, an Illinois municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as suggested by the late Chief Justice Rehnquist's concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005) (joined by three other justices), the state-litigation requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), whereby a Fifth Amendment Takings claim is not ripe in federal court until the landowner first seeks and is denied compensation in state court, should be reconsidered.

2. Whether *Williamson County*'s state-litigation ripeness rule should apply to physical takings cases.

3. Whether it is futile to require petitioners to attempt to fulfill *Williamson County*'s state-litigation requirement by continuing their state court challenge of well-established state law doctrine announced by the Illinois Supreme and appellate courts that unequivocably deny petitioners a state inverse condemnation remedy.

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PETITION FOR A WRIT OF CERTIORARI

Shirley A. Rockstead and Carol J. Henderson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The April 10, 2007 Opinion of the Court of Appeals (App., *infra*, 1a-10a) is as yet unreported in the Federal Reporter. The December 29, 2005 Opinion and Order of the district court (App., *infra*, 13a-27a) is reported at 431 F. Supp. 2d 804.

Two Orders of the Circuit Court of the Nineteenth Judicial Circuit, McHenry County, Illinois ("McHenry County Circuit Court") are relevant: the first, entitled "Order on Pending Motions" was dated July 14, 2004 (App., *infra*, 45a-56a), and the second, entitled "Order of Motion for Partial Summary Judgment," dated July 27, 2005 (App., *infra*, 29a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 2006 (App., *infra*, 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution

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[1] For the convenience of the Court, petitioners note that the Petition for a Writ of Certiorari in *McNamara v. City of Rittman, Ohio* (No. 06-1481), filed in this Court on May 10, 2007 and still pending, presents closely related questions.

provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

28 U.S.C. § 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article I, Section 15 of the Illinois Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

STATEMENT

This is a § 1983 Fifth Amendment Just Compensation action involving a physical invasion by reason of flooding induced by the respondent municipality that has permanently degraded a substantial part of petitioners' land into valueless wetlands.

This case presents important and recurring questions about the continuing validity of the "state-litigation" requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), *i.e.*, that a Fifth Amendment Takings claim under 42 U.S.C. § 1983 is not ripe for adjudication in federal court until the aggrieved property owner has exhausted all adequate state law compensation remedies.[2]

In his concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005), joined by Justices O'Connor, Kennedy and Thomas, the late Chief Justice Rehnquist stated his belief that "the Court should reconsider whether plaintiffs asserting a Fifth Amendment Takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." 545 U.S. at 352, 125 S. Ct. at 2510.

Thus, petitioners seek reconsideration of *Williamson County*'s state-litigation rule. In lieu thereof, they seek to

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[2] This requirement – also called the *Williamson County* "exhaustion" requirement – is the second of a two-pronged ripeness test. The first prong – finality, *Williamson County*, 473 U.S. at 194 – is automatically satisfied because this case involves a physical invasion, as the lower federal courts have repeatedly held. *See, e.g., Forseth v. Village of Sussex*, 199 F.3d 363, 372 n.12 (7th Cir. 2000) (a physical invasion is a final decision); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003); and *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002).

exclude takings by physical invasion from that rule's operation. Finally, under the unique facts of this case, they ask that the Court clarify the so-called futility exception to the state-litigation rule and find that they need not continue their futile pursuit of state compensation remedies that are *per se* unavailable to them.

Factual and Procedural Background – By this § 1983 action, petitioners Shirley A. Rockstead and Carol J. Henderson, the co-owners of land in Crystal Lake, Illinois, seek compensation from respondent City of Crystal Lake, Illinois ("City") under the Takings Clause of the Fifth Amendment because intermittent but regularly recurring flooding caused by the City's construction of certain municipal facilities has degraded much of their land into permanently unusable and valueless wetlands.[3]

The Illinois Case – Prior to filing this case, petitioners pursued eleven fruitless years of Illinois state court litigation seeking first damages at law, and then "inverse condemnation."

Petitioners' state court case seeking damages at law and an injunction was filed in 1994 in Cook County. After two years of arguments about venue, the case was transferred to the McHenry County Circuit Court. Over the succeeding years, the City repeatedly but unsuccessfully attacked petitioners' damage claims on the grounds of municipal immunity. Then, in 2003, as the case was nearing trial, the Illinois Supreme Court changed the law on municipal immunity for flooding cases.

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[3] Petitioners each own an undivided one-quarter interest in the property as do the heirs of their two deceased sisters. The four sisters each inherited their one-quarter interest from their mother in 1974. (R. 1: Complaint, ¶ 8). The deceased sisters and their heirs did not join in petitioners' attempts to obtain damage relief or just compensation and thus were not and are not parties in the state court case or this case.

Van Meter v. Darien Park District, 207 Ill. 2d 359; 799 N.E.2d 273 (2003). As a result, in mid-2004, the McHenry County Circuit Court granted summary judgment against petitioners on their damage claim on the grounds that the City was, after all, immune from suit for damages at law. (App., *infra*, 52a).

Petitioners then added a new claim for inverse condemnation under the Just Compensation Clause of Article I, § 15 of the Illinois Constitution.[4]

Petitioners did not advance a § 1983 Fifth Amendment takings claim.[5]

The City moved for summary judgment on the inverse

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[4] Inverse condemnation is simply a mandamus action brought by a land owner to compel a governmental body to institute proceedings under the Illinois Eminent Domain Act. *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 437, 525 N.E.2d 1176, 1182 (2d Dist. 1988) ("[w]here there has been a taking without just compensation, the owner may bring a mandamus action against the responsible agency to compel the institution of eminent domain proceedings."); *see also* Illinois Eminent Domain Act, 735 ILCS § 5/7-101, *et seq.* (2006) (current version at 735 ILCS § 30/1-1-1, *et seq.*), esp. § 5/7-122 (now § 30/10-5-65) (allowing reimbursement of costs and fees in inverse condemnation mandamus action as part of eminent domain award).

[5] *See* Argument, *infra*, p. 26. First, the Illinois Supreme Court applies *Williamson County*'s ripeness rules to federal takings claims filed in the Illinois state courts. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Second, the City could have prevented the state court consideration of the § 1983 claim pursuant to 28 U.S.C. § 1441 and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997) by removing the case to federal court, and then obtaining a ripeness dismissal of the § 1983 claim and a remand of the state compensation claim. *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003).

condemnation claim on the ground that in flooding cases Illinois eminent domain law allows a compensable taking only when there was a permanent inundation. The City cited three decisions that stand for that precise proposition: two from the Illinois Supreme Court and the third from the Second District Illinois Appellate Court which has appellate jurisdiction over the McHenry County Circuit Court. *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247, 251, 77 N.E.2d 697 (1948) (no taking without permanent inundation); *Herget Nat'l Bank v. Kenney*, 105 Ill. 2d 405, 475 N.E.2d 863 (1985) (same); *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994) (same).

The City argued that these precedents – requiring "permanent surface water, either standing or running on the property" as a necessary element of a taking by flooding – were "well-settled" Illinois law. And, argued the City, petitioners had no proof to meet that requirement. (Circuit Court Record: 2/15/05 City Mot. for Partial SJ).

In response, petitioners conceded that they could show neither a permanent inundation nor standing or running water on their property. Indeed, they had never contended that the flooding of their land was permanent, but only that it was intermittent but permanently recurring and had permanently degraded much of their land into unusable valueless wetlands.[6]

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[6] *Compare, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (no requirement of permanent surface inundation or flooding to qualify as wetlands under regulations promulgated under Clean Water Act).

The regulations of the United States Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA), the federal agencies charged with primary responsibility for administering of the Clean Water Act, define wetlands without any

(continued...)

(App., *infra*, 35a).

On July 27, 2005, as urged by the City, the McHenry County Circuit Court granted the City's Motion for Summary Judgment on Petitioners' inverse condemnation claim, ruling that intermittent flooding did not constitute a compensable taking under Illinois law. (*Id.*, App., *infra*, 41a-42a). After citing the pertinent Illinois decisions and quoting *Luperini* at length, the Circuit Court held:

> Although this Court believes it creates a harsh result, it appears that the current state of the law in the State of Illinois requires that there must be evidence of permanent surface water on property caused by the public improvement before a finding can be made that a physical invasion tantamount to a taking has occurred. The Plaintiffs have not and cannot present such evidence in this case. (*Id.*, App., *infra*, 41a-42a).

This Case – Unlike Illinois law, federal takings law does seem to require compensation for a taking caused by

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[6](...continued)
requirement of a permanent surface inundation or flooding. 33 C.F.R. § 328.3(b) (Corps Rule); 40 C.F.R. § 230.3(t) (EPA Rule). *See also* Wetlands Research Program Technical Report Y-87-1 (on-line edition), pp. 9-10 (Jan. 1987), http://www.saj.usace.army.mil/permit/documents/87manual.pdf and *Field Indicators of Hydric Soils in the United States*, Version 6.0. G.W. Hurt and L.M. Vasilas (eds.), p. 1 (USDA, NRCS 2006) (hydric soils result from repeated periods of saturation and/or inundation for more than a few days; no permanent surface inundation required). (Copies lodged with Clerk of this Court).

intermittent flooding. *United States v. Cress*, 243 U.S. 316, 328 (1917) ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.")

Thus, instead of appealing the Circuit Court's orders, petitioners accepted Illinois law as announced by the Circuit Court and instead filed this case in federal district court in Chicago seeking Just Compensation under the Fifth Amendment Takings Clause.[7] Only federal question jurisdiction under 28 U.S.C. § 1331 was invoked. (R. 1: Complaint).

In part, petitioners alleged that further resort to the Illinois court was futile because they could not meet an essential element for just compensation under Illinois law, *i.e.*, permanent flooding. (R. 1: Complaint, ¶¶ 33-34). Petitioners based that futility argument on the suggestion in *Williamson County* that exhaustion would be excused when a state compensation procedure is either "unavailable or inadequate." 473 U.S. at 196-197.[8] The Seventh and other circuit courts of

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[7] The state court case remains pending on petitioners' damage claim against the railroad and their injunctive claim against the railroad and the City. Illinois law provides a procedure for an interlocutory appeal. Illinois Supreme Court Rules 304 & 308. Of course, petitioners could also appeal once the case is finally disposed of. Illinois Supreme Court Rule 303. As the City pointed out to the District Court in this case (R. 11, p. 3), Illinois Supreme Court Rule 301 provides that "an appeal is a continuation of the proceeding."

[8] The language of *Williamson County* in which the circuits found this "futility" exception was as follows: "Respondent has not shown that the inverse condemnation procedure is unavailable or

(continued...)

appeals have labeled this a "futility" exception to *Williamson County*'s exhaustion requirement. *See, e.g., Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 456 (7th Cir. 2002); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d at 93.[9]

The City then reversed course. Whereas it had argued to the McHenry County Circuit Court that the requirement of permanent inundation was "well-settled" Illinois law, it argued to the district court that petitioners should have appealed the Circuit Court's ruling since maybe it was not quite so well-settled after all:

> If [petitioners] were to appeal this decision, the appellate court could disagree with the trial court's factual or legal conclusions and hold that [petitioners] are entitled to compensation under the current law. Or, [petitioners] could persuade the appellate court that the current law is indeed "harsh" and needs to be overruled, enabling

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[8](...continued)
inadequate and until it has utilized that procedure, its taking claim is premature." 473 U.S. at 196-197. *See also* Concurrence of Justice Brennan. 473 U.S. at 201.

[9] This Court has considered futility only in connection with the finality prong of *Williamson County*. *Palazzolo v. Rhode Island*, 533 U.S. 606, 624 (2001) (repeated applications to other state agencies would be futile and were not required to meet finality prong); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (only finality prong at issue); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (scaled-down development applications might be approved and therefore not futile to require them to reach a final decision).

> [petitioners] to be compensated. Either way, the appellate court could provide [petitioners] with just compensation, rendering this federal case unnecessary. (R. 11: City's Mot. to Dis., p. 4).

On those grounds, the district court dismissed this case on the grounds of lack of *Williamson County* ripeness, ruling that petitioners should have appealed the McHenry County Circuit Court's dismissal of their state inverse condemnation claim to the Illinois appellate courts.

First, the district court held that the *Williamson County* exhaustion requirement includes state court appellate procedures that must be exhausted before any § 1983 claim will be ripe in federal court. (App., *infra*, 19a-20a).

Second, even though Illinois law is so clearly against petitioners' position, the district court refused to accept the Illinois rule of law, long-standing and carefully applied by the state trial court to petitioners' land, that permanent flooding was a required prerequisite to an inverse condemnation claim under Illinois law. Thus, the district court rejected petitioners' argument that their state court appeal was inadequate and therefore futile. In the district court's view, flooding is "a question of degree," and the McHenry County Circuit Court's ruling turned on an interpretation of facts and law. Thus, the district court suggested, an Illinois appellate court might distinguish this case from the controlling Illinois decisions that require permanent flooding. Further, the district court saw no indication that the Illinois appellate court had "dug in its heels" on the requirement of permanent flooding. Therefore, said the district court, petitioners must appeal and that they "may lose on the merits, is neither here nor there." (App., *infra*, 25a) (citations and internal quotation marks omitted).

Although not briefed by the parties, the district court also alluded to what has become known as the "*Williamson*

trap," *i.e.*, that under the preclusive "full faith and credit" effect of 28 U.S.C. § 1738, Petitioners' failure to raise their federal takings claim in state court will bar them from ever raising it in federal court. Citing *San Remo Hotel*, 545 U.S. at 345-46, 125 S. Ct. at 2506, the District Court stated the matter as follows:

> A party cannot avoid the full faith and credit clause by reserving federal claims for litigation in federal court. The *San Remo* decision affirms that despite the preclusive effect that a state court decision may have on a future federal case, plaintiffs must still first seek compensation in state courts.

This Appeal – Petitioners timely appealed to the Seventh Circuit. They moved for an early argument and expedited consideration so that they could promptly return to state court, if necessary, and fully protect their rights and pursue any further appellate remedies, albeit inadequate, on their Illinois takings claim and protect by whatever means necessary their federal takings claim. (*See* Appellant's May 1, 2006 Motion to Schedule Oral Argument for July 11 or 12 and for Accelerated Consideration of Appeal).

The case was argued on October 31, 2006, and that afternoon the Court of Appeals entered an order that "[j]udgment is affirmed, opinion to follow." (App., *infra*, 12a).

The Opinion and Judgment of affirmance were entered on April 10, 2007. Also committing petitioners to the state court by requiring an appeal of the Circuit Court's no inverse condemnation without permanent flooding ruling, the panel relied on a slightly different incarnation of the district court's conclusion that the Illinois state appellate court might well reconsider its hard and fast rule that only permanent flooding amounts to a taking:

> Intermittent flooding . . . [which transforms] an owner's property into permanent wetlands is hard to distinguish from permanent flooding. . . . (App., *infra*, 6a).
>
> We see a glimmering of recognition of this point in *Luperini* [the controlling Illinois appellate precedent] (*Id.*).
>
> The Supreme Court of Illinois has not weighed in on the issue since . . . 1948, more than half a century ago. It is premature to conclude that if faced with a case such as this it would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine. (App., *infra*, at 7a).

In sum, like the district court, the Seventh Circuit simply refused to accept the long-standing "permanent flooding" rule adopted by the Illinois appellate courts and applied by the McHenry County Circuit Court to petitioners' land. Thus, in strict conformance with *Williamson County*'s state-litigation requirement, the Court ruled that petitioners must pursue the state inverse condemnation to its inevitable unhappy conclusion in the Illinois appellate courts on the chance that this long-established rule of Illinois inverse condemnation law might not be "mechanically appli[ed]." (*Id.*).

Moreover, the Panel suggested that, by asserting that they had no remedy under Illinois inverse condemnation law, petitioners "[shot] themselves in the foot" and would find that sentence quoted against them by the respondent City once litigation resumed in state court. (App., *infra*, 7a-8a). The Court made nothing of the fact that the respondent City argued in the McHenry County Circuit Court that the permanent

flooding rule was settled, but then reversed course in the district court and argued that the rule might somehow be subject to question. And, more importantly, the Court of Appeals made no mention of the fact that, as petitioners will now show, continued pursuit of their inverse condemnation claim in state court would extinguish, not ripen, petitioners' right to later file their Fifth Amendment takings claim in federal court.

REASONS FOR GRANTING THE PETITION

Concurring in *San Remo,* the late Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, recommended that "in an appropriate case," 545 U.S. at 352, 125 S. Ct. at 2510, this Court should reconsider the exhaustion prong of *Williamson County*, because it "may have been mistaken." 545 U.S. at 348, 125 S. Ct. at 2507.

This is that case. *Williamson County*'s "justifications for its state-litigation requirement are suspect [and] its impact on takings plaintiffs is dramatic." *Id.* Therefore, that requirement should be overruled. In any event, there are no legitimate prudential or constitutional reasons for the blind application of this state-litigation requirement to cases, like this one, involving only physical takings. Finally, if the rule is to remain in place and if it must include physical takings case, petitioners have fully met their burdens by pursuing a futile state claim in the state trial court.

1. *Williamson County* Should Be Reconsidered Because, When Coupled With The Full Faith And Credit Statute, It Extinguishes, Not Ripens, The Right To Bring A Fifth Amendment Takings Action In Federal Court.

Petitioners do not blithely ask this Court to overturn one of its holdings, but note instead that "when governing decisions

are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

Stare decisis "is at its weakest" when a prior decision involved the interpretation of the United States Constitution because that interpretation can be altered only by constitutional amendment or by this Court. *Agostini v. Felton*, 521 U.S. 203, 217 (1997).

Furthermore, stare decisis is of substantially less force when a precedent is "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *see also Teague v. Lane*, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting) (quoting *Vasquez*).

Since the issue presented involves at bottom an interpretation of the Just Compensation Clause of the Fifth Amendment, the stare decisis effect of *Williamson County* has less force. The polite puzzlement of the lower federal courts and their struggles to apply *Williamson County*, and the firestorm of scholarly criticism (*see* Note 10, *infra*, p. 15), suggest that the exhaustion rule is "outdated, ill-founded, [and] unworkable." But surely Chief Justice Rehnquist's *San Remo* concurrence demonstrates that *Williamson County*'s state-litigation requirement is legitimately vulnerable to serious reconsideration.

Thus, Petitioners respectfully submit that reconsideration of *Williamson County*'s exhaustion requirement is fully warranted.

a. The Interaction Of *Williamson County*'s Exhaustion Requirement With 28 U.S.C. § 1738 Extinguishes, Not Ripens, A Federal

Court Section 1983 Fifth Amendment Takings Claim.

As Chief Justice Rehnquist's *San Remo* concurrence noted: the exhaustion prong of "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation clause." 545 U.S. at 351, 125 S. Ct. at 2509.

This is the "catch-22," the "*Williamson* trap," referred to by the district court, (App., *infra*, 26a), that has provoked an outpouring of scholarly comment[10] most critical, some

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[10] Stephen E. Abraham, *Williamson County Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101 (2001); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Pol'y 99, 102 (2000); Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 Urb. Law. 941 (2000); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L.J. 73 (1988); J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How The England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 210 (2003); John J. Delaney & Duane J. Desiderio, *Survey of Federal Land Use Takings Cases 1990-1998*, 31 Urb. Law. 202 (1999); John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 246 (1999); Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683

(continued...)

surprisingly harsh, and that has perplexed the lower federal

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[10](...continued)
(1999); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307 (1998); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 22-24 (1992); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 2 (1999); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994); Thomas E. Roberts, *Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 Envtl. L. Rep. 10353 (2001); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523 (1995); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. and Mary L. Rev. 251 (2006); and George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465 (2000).

courts.[11]

On its face, the state-litigation prong of *Williamson County* seems to mean that once such state compensation remedies are unsuccessful, the concomitant federal claim, having been thereby "ripened," can then be asserted (or re-asserted) in federal court. *Williamson County*'s use of the adjective "premature" to describe the federal claim suggests as much,[12] 473 U.S. at 185-86, 194-95, 197 & 200. The Seventh and Eighth Circuits have so concluded. *Forseth v. Village of Sussex*, 199 F.3d at 373. ("Should Plaintiffs sufficiently pursue their case in state court only to be denied relief, they may then seek relief in federal court on their federal substantive due process and takings claims."); *Watson v. City of Chicago*, 2000 U.S. Dist. LEXIS 5947 (N.D. Ill. 2000) (same, following *Forseth*); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1042 (8th Cir. 2003) ("This action is without prejudice to the right of the plaintiff, if he files a state-court case and loses, to file a new action in a federal court and make whatever arguments he wishes with respect to the effect of the prior state-court adjudication.").

The fact is, however, that due to the preclusive effect of the full faith and credit statute, 28 U.S.C. § 1738 – encompassing, as it does, the doctrines of res judicata (issue preclusion) and collateral estoppel (claim preclusion) – the process of "ripening" the federal claim actually bars a federal

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[11] *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 (6th Cir 2004) (referring to this dilemma as "[t]he catch-22 of the "*Williamson* trap"); *Franco v. District of Columbia*, 2006 U.S. Dist. LEXIS 73534, at *18 (D.D.C. Oct. 10, 2006).

[12] Premature: happening, arriving, existing, or performed before the proper, usual, or intended time. *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

court from hearing it.[13] *San Remo*, 545 U.S. at 336, 125 S. Ct. at 2500 (quoting *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980)). And, as Chief Justice Rehnquist's concurrence in *San Remo* recognizes, there is likely nothing a claimant can do to avoid that effect. 545 U.S. at 351, 125 S. Ct. at 2509. The reasons are simple:

San Remo held that, if state law so provides, any issues that form a part of a federal Just Compensation claim and were previously decided in a state court case cannot be relitigated in a federal court even though the state court may have resolved those issues as part of deciding state law Just Compensation claims. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507. More precisely, if state law bars relitigation of an already-decided issue in state courts, § 1738 gives that bar rule full faith and credit and bars relitigation of that issue in federal court. Simply stated, § 1738 requires a federal court to honor the issue preclusion rules of state law.

The courts of Illinois reflect this fundamental principle of the law of judgments, whether coined as a matter of res judicata or collateral estoppel, and bar relitigation of issues already decided in an earlier case. *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490, 626 N.E.2d 225, 228 (1993) ("res judicata extends . . . to every matter that was actually determined in the prior suit . . . ."); *Du Page Forklift Serv. v. Material Handling Servs.*, 195 Ill. 2d 71, 78, 744 N.E.2d 845, 849 (2001) ("once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive

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[13] The full faith and credit statute arises from Article IV, § 1 of the United States Constitution that provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

Thus, if an issue that forms a part of a Fifth Amendment Just Compensation claim is decided in a state court proceeding, it is barred from relitigation in the subsequent federal court takings case promised by *Williamson County*. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507.

This has two permutations: first, if a claimant *does* assert a Fifth Amendment Takings claim in his required state court proceeding and loses, or, second, if an element of such a federal claim coincides with an element of state compensation law and is lost, the matter is concluded: the claimant is barred from relitigating that claim or element in federal court if he or she would be barred from relitigating either in a subsequent state court action.

Conversely, under the usual rules of res judicata, if a just compensation claimant *does not* assert a federal Just Compensation claim in the state court action required by *Williamson County*, relitigation of that claim in federal court is barred. If state law so provides, § 1738 requires a federal court to honor the res judicata rule barring litigation of a claim that *could have been, but was not*, advanced in state court. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (state-court judgments have res judicata claim-preclusive effects in § 1983 actions, barring constitutional claims not brought in prior state-court contract action). This is precisely the rule in Illinois. *Torcasso*, 157 Ill. 2d at 490, 626 N.E.2d at 228 ("[R]es judicata extends not only to every matter that was actually determined in the prior suit but to every other matter that *might have been raised* and determined in it.") (emphasis added).

Therefore, a federal takings claim not brought in the state court action cannot be considered in a subsequent federal court action. Several federal circuits have so held. *Wilkinson*

v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319, 1324 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos,* 989 F.2d 362, 364-65 (9th Cir. 1993); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989).

The effect of the interaction of *Williamson County*'s exhaustion rule with § 1738 is simply to bar federal court consideration of § 1983 Just Compensation claims in almost all conceivable situations. *Williamson County* treats that claim as premature for federal court adjudication, but once the process of ripening the claim is complete, § 1738 extinguishes it. A claimant cannot litigate a federal Just Compensation claim in federal court, whether that claim or an essential part of it *was* or *was not* litigated in state court.

This is the "dramatic effect" on takings plaintiffs suggested by the late Chief Justice's *San Remo* concurrence, 545 U.S. at 348, 125 S. Ct. at 2507. It is the "catch-22," "The *Williamson* trap," described by the lower courts and commentators.

There's the rub that brings petitioners to this Court.

b. The Justifications for *Williamson County*'s State-Litigation Requirement Are Suspect.

It is difficult to reconcile the counter-intuitive interaction of *Williamson County*'s state-litigation requirement and § 1738 with the "concepts of 'fairness and justice' that underlie the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. at 633 (internal citations omitted). Though those concepts may be "less than fully determinate," *id.*, and though they may relate largely to the protecting citizens from the unjust and unfair imposition of public obligations on the few, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), surely the procedural route toward the vindication of this important Constitutional right should be just and fair as well. One thing is for sure: citizens should not confront a "catch-22" or a "trap"

as to where, how and when they invoke judicial remedies to vindicate a constitutional right. Moreover, the reasons underlying any rule that excludes citizens from the federal courts should have reasoned support in law and policy and should at least be defensible. Petitioners respectfully submit that *Williamson County* fails those tests. In the late Chief Justice's words, the "justifications for [*Williamson County*'s] state-litigation requirement are suspect." 545 U.S. at 352, 125 S. Ct. at 2509-10.

The Basis for the State-Litigation Requirement – Is It Constitutional or Prudential? – Williamson County suggested that the state-litigation requirement stemmed from the Fifth Amendment: "The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 194-95 & n.13. The rationale is that the Fifth Amendment does not prevent takings but only takings without compensation, so that the Takings Clause is not violated until a claimant has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Id.*

While that concept recurs in this Court's more recent takings cases, *see City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 714 (1999), it is directly contrary on its face to the line of this Court's decisions *in physical takings cases* that the constitutional violation occurs at the time of the taking. In *United States v. Dickinson*, an intermittent flooding case, the Court stated that "the land was taken when it was taken and an obligation to pay for it then arose." 331 U.S. 745, 751 (1947). *United States v. Dow*, a physical taking case, held that "if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." 357 U.S. 17, 22 (1958). *United States v. Clarke*, another physical taking case, quoted *Dow* and

held that "[w]hen a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued.'" 445 U.S. 253, 258 (1980) (alteration of quotation in original).

Thus, if *Williamson County*'s state-litigation requirement is constitutionally based on the Takings Clause, it is incongruent, if not downright contradictory to the rule, at least in physical takings cases, that the constitutional takings claim accrues or arises or occurs at the time of the taking.[14]

Perhaps because of this incongruity, at least one decision of this Court has referred to the state-litigation rule as merely a "prudential requirement." *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-734 (1997). Indeed, *San Remo* uses the same rubric as well. 545 U.S. at 342, 125 S. Ct. at 2504.

But, an incongruity lurks here too. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 148-149; *accord, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-733 (1998). But, a *prudential* ripeness rule requires the evaluation of "both the fitness of the issues for judicial decision and the hardship to

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[14] Petitioners respectfully submit that, for this reason alone, if *Williamson County* is to survive, it should exclude physical takings cases.

the parties of withholding court consideration." *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *accord, Texas v. United States*, 523 U.S. 296, 301 (1998).

Thus, if *Williamson County*'s state-litigation rule is prudential, then an evaluation of the fitness of the issues for judicial decision and the hardship on the parties seems to be required, especially if the concepts underlying the Fifth Amendment's Takings Clause are "justice and fairness."

Because of the lack of guidance on the basis of the *Williamson County* state-litigation rule, neither the district court nor the Court of Appeals herein gave either factor any consideration. Surely, petitioners' claim of a permanent physical taking – here by intermittent but recurring flooding – is fit for review. Physical takings cases "are relatively rare, easily identified and usually represent a greater affront to individual property rights." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). And, "[w]hether a permanent physical occupation has occurred presents relatively few problems of proof." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).[15]

So there is no difficult balancing required in

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[15] And this case does not fall within the class of intermittent flooding cases alluded to in *Tahoe-Sierra*, 535 U.S. at 436, because the flooding here has so saturated petitioners' land that it has been permanently degraded to wetlands even though inundations of the surface come and go. Indeed, as in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992), petitioners have made no claim of a temporary taking in the courts below. Therefore, because a temporary taking issue is not presented, this case can be decided "on the permanent taking theory that both the trial court and the State Supreme Court had addressed." *Tahoe-Sierra*, 535 U.S. at 330.

determining the existence or extent of the alleged taking. Instead, a *per se* rule of compensation applies: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (citation omitted).

Moreover, the hardship to petitioners from not hearing this case is manifest. Each year, petitioners' inheritance degrades even more. With the law's delay, the City has masterfully frustrated petitioners' efforts to gain Just Compensation. With all the insolence of office, the City piled up a mound of dirt and hid the drainage pipe that first cut off the drainage and inexorably flooded petitioners' land. Taking arms, petitioners sought damages at law in the state court and failed. They sought constitutional compensation under the Illinois Constitution but failed because of a quirk in Illinois law. Then, they are told that until they seek to change that rule by recourse to the Illinois appellate courts, their Fifth Amendment Just Compensation claim cannot be heard by the federal courts. If *Williamson County*'s state-litigation rule is prudential, surely these hardships weigh somewhere in the balance.

Of the many categories of § 1983 plaintiffs, why must only Takings Claimants exhaust state remedies? – This result is the more puzzling because of the different rule for most other § 1983 actions. As the late Chief Justice Rehnquist's *San Remo* concurrence points out, "it is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." 545 U.S. at 349, 125 S. Ct. at 2508. His concurrence cites *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496 (1982) for the proposition that a § 1983 plaintiff is not required to exhaust state administrative remedies. In virtually all other § 1983 situations, this is a firmly established principle.

"Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court." *Porter v. Nussle*, 534 U.S. 516, 523 (2002). Beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671-673 (1963), this Court has on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. *See Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973); *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *King v. Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico v. California*, 389 U.S. 416 (1967).

Indeed, as *Steffel v. Thompson* held, "[w]hen federal claims are premised on [§ 1983] – as they are here – we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. 452, 472-473 (1974). Moreover, from the time of *Monroe v. Pape*, 365 U.S. 167 (1961) *overruled on other grounds, Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), a § 1983 claimant has not been required to exhaust state judicial remedies.

This Court has not explained why only takings claimants must exhaust state remedies before seeking the protection of the federal court. But, *Williamson County*'s state-litigation rule does just that. Thus, yet another incongruity, since it seems hard to reconcile the state-litigation rule with this Court's explanation that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This difference justifies a reasoned

consideration by this Court.[16]

The state courts do not have any greater expertise in resolving challenges to land use regulations – The late Chief Justice's concurrence adequately questions *San Remo's* reliance on the principle of comity on tax matters reflected in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) as a justification for the state-litigation rule. As he explained, there is no comparable history of comity in the area of land use regulations. 545 U.S. at 349, 125 S. Ct. at 2508. Petitioners need add nothing more and only stress his point that the federal courts routinely are involved in challenges to municipal land use regulations under the First Amendment and Equal Protection Clause. 545 U.S. at 350-51, 125 S. Ct. at 2509 (citing cases).

Defendants can arguably prevent a plaintiff from

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[16] The late Chief Justice's concurrence notes the arguments of two *amici* therein that two cases *Williamson County* cites – *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 2862 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981) – provide[] limited support" for the state-litigation rule. 545 U.S. at 349 n.1, 125 S. Ct. at 2508.

Length limitations prevent an extended discussion of that point in this Petition. However, one thing seems clear: *Williamson County* was wrong in stating that *Monsanto* "held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County*, 473 U.S. at 195. Simply as a matter of facial logic, this cannot be. For, it is the Tucker Act that provides the judicial remedy for a claimant to sue the Federal Government in the U.S. Court of Claims for an alleged taking. Thus, it is a tautology to describe *Monsanto* as saying that a claimant must pursue all remedies under the Tucker Act before suing under the Tucker Act. But that is what *Williamson County* says, a mischaracterization that at least facially undercuts the force of *Williamson County*'s state-litigation requirement.

asserting a § 1983 federal takings claim in state court – As the late Chief Justice's *San Remo* concurrence noted, some state courts "themselves apply the state-litigation requirement from *Williamson County*" and refuse to entertain a federal takings claim until all state law compensation has been denied. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. Indeed, the Illinois Supreme Court has adopted *Williamson County*'s ripeness rule in that context. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Hence, petitioners herein did not advance a § 1983 takings claim in their state court action because it was not ripe there either.

It seems no answer (as the Opinion for the Court in *San Remo* says) that *Williamson County* "does not preclude" state courts' consideration of a claimant's Fifth Amendment Just Compensation claim simultaneously with, and in the alternative, to a state law claim. *San Remo*, 545 U.S. at 346, 125 S. Ct. at 2506. As the Chief Justice pointed out, that is so only if ripeness is prudential rather than constitutional, the considerably difficult problem discussed above, Argument, *supra*, pp. 21-24, that neither *Williamson County* nor *San Remo* answers. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. In any event, on the grounds of failure to exhaust state remedies, state courts are still refusing to hear § 1983 claims appended to state court cases. *See, e.g., Leeper Elec. Servs. v. City of Carmel*, 847 N.E.2d 227 (Ind. App. 2006); *but see City of Marion v. Howard*, 832 N.E.2d 528, 533 (Ind. App. 2005).

In another curious twist, however, the resolution of that problem is beside the point because by invoking the removal jurisdiction of the federal court, a takings defendant can prevent a state court from considering such a federal claim in all events. It seems a fair reading of *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), that if a compensation claimant includes a federal Fifth Amendment Just Compensation claim in his or her state court case, a state court takings defendant can

remove that case to federal court under 28 U.S.C. § 1441. Once there, it is obvious that a defendant can obtain both a dismissal of the federal takings claim for lack of ripeness, and remand of the rest of the case back to state court. This is the necessary result of the interaction of *Int'l College of Surgeons* removal rule with *Williamson County's* ripeness rule.

And, this is no theoretical exercise. In *Key Outdoor, Inc. v. City of Galesburg,* 327 F.3d 549 (7th Cir. 2003), the defendant City removed such a state court case that advanced a federal and state takings claims. The Seventh Circuit ruled that once removed the federal claim was properly dismissed as unripe, and that the state law compensation claim should be remanded to the state court.[17]

It is difficult to understand why a defendant can remove to federal court an unripe federal claim that a plaintiff could not file in federal court in the first instance. But, more seriously, this difference in treatment gives takings defendants a relatively

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[17] Equally as puzzling is the possibility that a state court will consider only a federal takings claim without reference to what compensation state law might provide or whether state law remedies had been exhausted. This is precisely what happened in *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991) (Hartwell, J., dissenting) ("Having determined that [there was] a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution."), *rev'd on other grounds*, 505 U.S. 1003 (1992). This further reveals the frailty in the logic of both the state-litigation rule and *San Remo's* suggestion that nothing prevents a state court from hearing a federal takings claim along with state law claims. In fact, it seems a state court can simply ignore any state law claim and instead proceed to decide the § 1983 federal takings claim that *Williamson County* says is not ripe for decision. Thus, *Williamson County*'s state-litigation rule, pointless in reasoning, is pointless as well in effect.

easy way to prevent a state court from considering a federal takings claim at all. This is yet another *Williamson County* anomaly.

In finding the challenge in *Williamson County* to be premature, this Court somewhat cryptically noted that the landowner had "not shown that the inverse condemnation procedure [was] unavailable or inadequate." 473 U.S. at 196-197. The Seventh Circuit has characterized this as a "limited exception to its exhaustion requirement based on the futility of seeking state court relief." *Daniels v. The Area Plan Commission of Allen County,* 306 F.3d 445, 456 (7th Cir. 2002). Other Circuits have recognized this rule as well. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 92 (1st Cir. 2003); *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Naegele Outdoor Advertising v. Durham*, 844 F.2d 172, 175 (4th Cir. 1988). *See also Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648, 651 (4th Cir. 2005).

2. Once the Federal Courts Accept Illinois Law, As They Are Required To Do, It Is Clear That Further Resort To The Illinois Courts Would Be Futile.

The district court and Seventh Circuit simply refused to accept long-standing Illinois law that inverse condemnation under the Illinois Constitution and Illinois condemnation statute is only triggered by permanent flooding. This was error.

At bottom, petitioners' state law inverse condemnation claim required the interpretation and application of the Just Compensation Clause of the Illinois Constitution, Illinois Const. Art. I, § 15, which was the central focus of the controlling Illinois decisions. *People ex rel. Pratt v. Rosenfield*,

399 Ill. 247, 251, 77 N.E.2d 697 (1948), and *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994).

The district court's and Seventh Circuit's refusal to follow these controlling state law decisions clearly announcing rules of Illinois state constitutional and statutory law simply does not comport with the requirement that the lower federal courts must follow state law as announced by the state courts. 28 U.S.C. § 1652 (Rule of Decision Act). The decisions of higher and intermediate state courts are definitive on such matters of state law even if the federal court thinks they are wrong. *West v. AT&T*, 311 U.S. 223, 237 (1940); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (a federal court cannot construe a state statute differently than the highest court of the state). *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

In fact, Illinois law absolutely bars petitioners from pursuing inverse condemnation. This is the classic case of futility – petitioners should not be forced to pursue a remedy that is unavailable as a matter of clearly announced state law. This Court should so rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2007

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 06-1286

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,

Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 4485–**James B. Moran**, *Judge.*

ARGUED OCTOBER 31, 2006–DECIDED OCTOBER 31, 2006*
OPINION APRIL 10, 2007

Before POSNER, WOOD, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge*. The Constitution does not

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* With a notation that an opinion would follow.

forbid government to take private property for public use; it merely requires that, if it does so, it pay the owner just compensation. Therefore the Constitution is not violated until the government refuses to compensate the owner. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 and n. 13 (1985). When, as alleged in this case, the government (a town in Illinois) takes the property without a condemnation proceeding, the owner must, if the government refuses to pay, file a suit in state court–what is called an "inverse condemnation" suit–to obtain the compensation due him, and he must exhaust his state judicial remedies, if necessary by appealing an adverse decision. *Daniels v. Area Plan Commission*, 306 F.3d 445, 454-55 (7th Cir. 2002). He must proceed in that way because unless and until the state courts turn him down, his right to just compensation has not been infringed. *Gamble v. Eau Claire County*, 5 F.3d 285, 285-86 (7th Cir. 1993).

The plaintiffs started down that path, but before completing their state-court proceeding (which remains pending) filed the present suit, in federal court, seeking just compensation under federal constitutional law. They justify this short-circuiting of the state courts on the ground that state law is so clearly against them that it would be futile to proceed to final judgment in those courts. The district court disagreed and granted the town's motion to dismiss.

The plaintiffs own a parcel of land that on its west side is adjacent to a railroad right of way and on its north

side to storm-water detention ponds and a waste water treatment facility; the ponds and the treatment facility are owned by Crystal Lake. The plaintiffs' land drained through a ditch in the railroad right of way until the town installed a pipeline in the ditch at an angle that cut off the plaintiffs' drainage, resulting in intermittent but recurring flooding of their land from the ponds that transformed it from productive farmland into worthless wetlands. It is the resulting impairment of the value of their land that the plaintiffs claim is a taking entitling them to just compensation.

They argue that under Illinois law, as authoritatively declared in *People ex rel. Pratt v. Rosenfield*, 77 N.E.2d 697, 699-700 (Ill. 1948), it is plain that a suit for inverse condemnation ("inverse" because brought by the landowner, complaining of the taking, rather than brought by the condemnor to obtain title to the land) will not lie for damage caused by intermittent flooding, whatever the consequences of the flooding. And so the state trial court ruled in the pending state court litigation, before the plaintiffs, contending that the intermittent flooding of their property resulted in a taking as a matter of federal constitutional law, turned to federal court. The state judge's ruling was interlocutory because other claims and parties remain in the state litigation, but the plaintiffs could have sought the judge's leave to appeal the ruling under Illinois's counterpart to Fed. R. Civ. P. 54(b). See Ill. S. Ct. R. 304(a); *In re Marriage of Lentz*, 403 N.E.2d 1036, 1039 (Ill. 1980). They still can obtain appellate review of the ruling, when the state litigation concludes. But they say

there's no point in continuing in state court because the outcome is foreordained by state law.

If a state statute or constitutional provision provided that inverse condemnation was inapplicable to an impairment of land values that was due to intermittent flooding, recourse to state remedies would indeed be pointless and would therefore not be required. *Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*, 473 U.S. at 197; *Daniels v. Area Plan Commission*, *supra*, 306 F.3d at 456-58. But the situation is different when as in this case the obstacle to the remedy is a state common law doctrine. *SGB Financial Services, Inc. v. Consolidated City of Indianapolis*, 235 F.3d 1036, 1037-39 (7th Cir. 2000); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Austin v. City & County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir. 1988). Judges do not make statutes or constitutions and cannot change them, but they do make, and they can–and do–change, common law doctrines. Such doctrines (such as the intermittent-flooding doctrine of the *Pratt* decision) tend, moreover, to be flexible in application. The "black letter" rules that restaters and treatise writers derive from common law decisions are usually standards rather than hard-and-fast rules–generalizations that yield to the particulars of the individual case. Holmes went too far when he stated without qualification that "general propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion), but one sees what he was driving at. So when a question of the meaning or application of a state common law doctrine is at issue,

"instead of asking a federal judge to guess what a state court is likely to do, why not ask the state court?" *SGB Financial Services, Inc. v. Consolidated City of Indianapolis*, *supra*, 235 F.3d at 1038.

The Illinois cases that hold that intermittent flooding does not create the sort of damage for which compensation is required rest on the common sense view that ordinarily such flooding does not do permanent damage. Illustrative is *Luperini v. County of Du Page*, 637 N.E.2d 1264, 1269 (Ill. App. 1994), where we read that "the evidence did not establish that plaintiffs were prevented from the use of their premises because of permanent accumulations of water." Many of us have had our basements flooded from time to time but we do not expect such incidents to cause a permanent reduction in the value of the house. Flood waters recede and the flooded buildings or land normally recover their previous value.

But the situation has changed with the rise of severe legal restrictions (especially those imposed by the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*) on the use that a property owner may make of land declared to be wetlands. E.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001); *Rapanos v. United States*, 126 S. Ct. 2208, 2225-27 (2006) (plurality opinion); *Kelly v. EPA*, 203 F.3d 519, 520-22 (7th Cir. 2000); *Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 258 (7th Cir. 1993); *Smith v. City of Clearwater*, 383 So. 2d 681, 684-85 (Fla. App. 1980). Such a declaration, while good news for certain birds and other types of animal and for the health of the environment

in general, is bad news for the owner of the property, who may find himself forbidden to build improvements on it or otherwise put it to what the market would consider a productive use. E.g., *Bayou Des Familles Development Corp. v. United States*, 130 F.3d 1034, 1039-40 (Fed. Cir. 1997); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed. Cir. 1994). Intermittent flooding the cumulative effect of which is to transform an owner's property into permanent wetlands is hard to distinguish from permanent flooding that puts the land permanently underwater. Soggy and submerged are not synonyms but in the modern era of wetlands protection may have the same effect on property values.

We see a glimmering of recognition of this point in *Luperini v. County of DuPage, supra*. The case involved the same kind of intermittent flooding as this case–flooding due to the county's having installed a storm sewer on property adjacent to the plaintiffs' property that diverted water onto their property. In ruling against the plaintiffs in their inverse condemnation suit on the ground that "where the public improvement [the storm sewer] causes only temporary accumulations of water on the subject property, a taking has not occurred," the court noted evidence that "the plaintiffs' property had been subject to occasional flooding prior to the storm sewer being installed and that an undefined portion of the property was previously classified as jurisdictional wetlands." 637 N.E.2d at 1268. The implication is that if the flooding *created* "jurisdictional wetlands," this might be deemed a taking under Illinois law. There was also

evidence that despite the intermittent flooding the plaintiffs could continue to use the property as they had been doing, albeit at a higher cost; and there was also evidence that they might be able to eliminate the problem created by the storm sewer by installing a covered conduit conveyance system. *Id.* at 1269. All this evidence may just have been icing on the cake, but the court's recital of it suggests that had the evidence been more favorable to the plaintiffs they might have won.

The Supreme Court of Illinois has not weighed in on the issue since the *Pratt* case in 1948, more than half a century ago. It is premature to conclude that if faced with a case such as this it would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine.

For us to rule otherwise would actually do a disfavor to property owners such as these plaintiffs, who, in order to bring the case within a "futility" exception find themselves arguing against themselves, as when they say in their brief: "The matter is not remotely debatable. The Owners have no remedy under Illinois inverse condemnation law." The first sentence is definitely wrong, and the second sentence may well be wrong. But when the plaintiffs, disappointed in this court, resume the litigation in the state court, they will find those sentences quoted against them by their adversaries.

A "futility" exception broad enough to embrace this case not only would induce owners to shoot themselves in

the foot, but would reflect an exaggerated conception of the rigidity of common law doctrines, make the right to sue in federal court depend on uncertain predictions about what state courts would do in a similar case, and curtail the evolution of state common law by keeping cases that challenge the existing doctrine out of state court where they could influence the law.

We did say in the *SGB* case that "in principle one could imagine a precedent with the same effect as the lack of an inverse-condemnation law. Suppose, for example, the Supreme Court of Indiana had held that regulatory takings as a class are never compensable under the state's inverse-condemnation law." *SGB Financial Services, Inc. v. Consolidated City of Indianapolis, supra*, 235 F.3d at 1039; see also *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988); *Austin v. City & County of Honolulu, supra*, 840 F.2d at 680-81. We have found only one case to fit *SGB*'s example–*Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506-07 (9th Cir. 1990), which allowed a landowner to bypass the state courts because the state's highest court had held that landowners could not seek compensation for a regulatory taking through inverse condemnation proceedings (or otherwise). *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979). But ours is not such a case; it is a case in which state law is uncertain because of the antiquity of the ruling state supreme court decision, and the intervening change in the legal status of wetlands. Recall the intimation in *Luperini* that flooding that creates "jurisdictional" (legally protected) wetlands might be deemed a compensable

taking under Illinois law.

So the plaintiffs' federal case was rightly dismissed, and that raises the question of what will happen to their federal claim pressed futilely on us. In state court they were seeking relief under Illinois state law, not, so far as we are aware, under the federal Constitution. Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if, as the present plaintiffs will have to do, the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law. For the general principle, see *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-29 (Ill. 1993), and *People ex rel. Burris v. Progressive Land Developers, Inc.*, 602 N.E.2d 820, 824-25 (Ill. 1992), and for its application to cases such as this see *American Nat'l Bank & Trust Co. v. City of Chicago*, 636 F. Supp. 374, 378-80, 384 (N.D. Ill. 1986) (Illinois law); *Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1322-25 (10th Cir. 1998) (per curiam); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993). The litigation in state court is the end of the road, see 28 U.S.C. § 1738, unless the state itself allows relitigation of the constitutional question. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 341-48 (2005).

It is unclear whether the plaintiffs have even raised their federal claim in the pending state court proceeding. (They have not pressed it.) If they have not done so but still can, they would be well advised to do so.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit

April 10, 2007
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 06-1286
SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 4485–**James B. Moran**, *Judge.*

JUDGMENT - WITH ORAL ARGUMENT

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

United States Court of Appeals
For the Seventh Circuit

October 31, 2006
Before
Hon. Richard A. Posner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

No. 06-1286

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *Plaintiffs-Appellants*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	
CITY OF CRYSTAL LAKE, a municipal corporation, *Defendant-Appellee.*	No. 05 C 4485
	James B. Moran, *Judge.*

ORDER

The judgment is AFFIRMED, opinion to follow.

APPENDIX B

United States District Court,
Northern District of Illinois,
Eastern Division

No. 05 C 4485

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs-Appellants,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendant-Appellee.

December 29, 2005

MEMORANDUM OPINION AND ORDER

MORAN, *Senior Judge.* Plaintiffs Shirley Rockstead and Carol Henderson brought this action against defendant City of Crystal Lake, alleging that defendant took their property without providing compensation, when it constructed various structures and facilities that created

flooding conditions on plaintiffs' property. Invoking the "takings clause" of the Fifth Amendment of the U.S. Constitution, plaintiffs seek just compensation. Defendant now moves to dismiss the action under Fed. R. Civ. P. 12(b)(6). For the following reasons, defendant's motion is granted.

BACKGROUND

The following facts are taken from plaintiffs' complaint. Plaintiffs' property is located in McHenry County, Illinois, and is partially contiguous to property owned by defendant. The natural drainage on plaintiffs' property was obstructed after defendant constructed culverts, pipelines, flood control and sanitary treatment facilities on the portion of its property that is adjacent to plaintiffs' property. As a result of defendant's additions, plaintiffs claim that water now drains toward, instead of away from, their land (cplt. at ¶¶ 11, 21). Plaintiffs claim that that land, which was previously cultivatable and used as productive farmland, has been reduced to useless wetlands (*id.* at ¶¶ 3, 16).

In 1994 plaintiffs filed an action seeking damages and equitable relief against defendant. *See Rockstead, et al. v. City of Crystal Lake*, No. 96 CH 297. This action has languished in state court for over a decade now, during which time plaintiffs have failed to recover damages or compensation. On July 14, 2004, the circuit court in McHenry County ruled that immunity shielded defendant

from damages. Then, on July 27, 2005, the circuit court held that plaintiffs' claim for inverse condemnation failed because they failed to show that their land was actually taken under Illinois law. This latter decision did not end plaintiffs' action in state court, as the circuit court found "a genuine issue of material fact as to the timeliness of the cause of action" (def. ex. B at 7). Less than two weeks after the circuit court denied plaintiffs compensation, plaintiffs filed a complaint in federal court. In their federal complaint, they claim that they have exhausted their state remedies and further action in state court would be futile. Subsequent to filing that complaint, plaintiffs and defendant settled a condemnation action brought by defendant in state court.

Defendant argues that the action is not ripe for federal review because plaintiffs failed to exhaust their state remedies. Defendant alternatively argues that even if the case is ripe for review, abstention is proper due to the ongoing state proceedings. Lastly, defendant contends that transfer of venue to the district court in the Western Division of the Northern District of Illinois is proper. Plaintiffs riposte that the case is ripe because appealing the circuit court's order is futile. They further contend that their inability to obtain relief in state court renders abstention improper, and that their federal action does not otherwise conflict with the ongoing state action. Plaintiffs also find the Eastern Division to be the most convenient

forum.

DISCUSSION

Prior to assessing the parties' arguments, we address several issues surrounding the proper standard of review. Defendant brings its motion to dismiss under Rule 12(b)(6), and it thus challenges the sufficiency of the complaint, not the underlying merits of plaintiffs' action. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). But by claiming that the case is not ripe for adjudication under the special ripeness rules that apply to "takings claims," defendant essentially argues the court lacks subject matter jurisdiction. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 957-58 (7th Cir. 2004). Thus, the motion should have been brought pursuant to Rule 12(b)(1).

While a Rule 12(b)(6) motion challenges the sufficiency of the complaint and is generally limited to the four corners of the complaint, with limited exceptions (*Thompson v. Illinois Department of Professional Regulation*, 300 F.3d 750, 753 (7th Cir. 2002); *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)), under Rule 12(b)(1) a court "look[s] behind the plaintiff's allegations and make[s] factual findings for purposes of assessing its subject matter jurisdiction" (*Palay v. United States*, 349 F.3d 418, 424 (7th Cir. 2003); *see also Long v. Shorebank Dev. Corp.*,

182 F.3d 548, 554 (7th Cir. 1999)). Documents external to the complaint are central to this motion. Not all of those documents are referred to in the complaint. Defendant does not challenge the allegations of jurisdiction in the complaint, and instead focuses on the truth of the facts alleged, specifically plaintiffs' claims of futility. *See Royal Towing, Inc. v. City of Harvey*, 350 F. Supp. 2d 750, 752 (N.D. Ill. 2004).

We choose to proceed under Rule 12(b)(1), even though defendant failed to invoke that rule. Doing so is faithful to our obligation to police subject matter jurisdiction. *See Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir. 1998). Under Rule 12(b)(1), we accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of plaintiffs. *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

Generally, a plaintiff need not exhaust judicial remedies as a precondition to bringing a federal civil rights suit. *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993) (citing *Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982)). However, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court established "special ripeness standards for constitutional property rights claims." *Patel v. City of Chicago*, 383 F.3d 569, 570 (2004). The two-pronged *Williamson County* ripeness standard requires that

"plaintiff must demonstrate that he or she received a 'final decision' from the relevant government entity" and "the plaintiff must have sought 'compensation through the procedures the State has provided for doing so.'" *Forseth v. Village of Sussex*, 199 F.3d 363, 372 (7th Cir. 2000) (quoting *Williamson*, 473 U.S. at 186-87, 194). The first prong has been dubbed the "final decision requirement," and the second, the "exhaustion requirement." *Id.* Because this case involves a physical, as opposed to regulatory taking,[1] the final decision requirement has been met. *See id.* at 372 n.12 (physical invasion constitutes a "final decision"); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003). The "streamlined inquiry" focuses on *Williamson County's* exhaustion requirement. *Greenfield Mills*, 361 F.3d at 958.

The exhaustion requirement generally refers "to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County*, 473 U.S. at 193. The Court forged an exception to the exhaustion requirement when it noted that a plaintiff may be excused from

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[1] *Williamson County* focused on a regulatory taking, but the ripeness rules announced therein have been extended to physical takings. *See Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2d Cir. 1995); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002).

exhausting available state procedures if he demonstrates that such procedures are "unavailable or inadequate." *Id.* at 197. Thus, a plaintiff need not first resort to state procedures if doing so would be futile. *Daniels v. Area Plan Commission*, 306 F.3d 445, 456 (7th Cir. 2002). Plaintiffs claim that they are excused from exhausting their state remedies by appealing the circuit court's decision because the remedy they seek is unavailable under Illinois law and an appeal would be futile. But first we must inquire whether an appeal is ordinarily required.

Both parties appear to assume that seeking appellate review is necessary to exhaust state remedies. In the vast majority of cases dismissed for failing to satisfy the exhaustion requirement, the plaintiff bypasses all state court opportunities for compensation. *See, e.g., Forseth, supra; Gamble, supra; Hager v. City of W. Peoria*, 84 F.3d 865, 869 (7th Cir. 1996); *Kennedy v. Village of Oak Lawn*, 2000 U.S. Dist. LEXIS 16783; *Popp v. City of Aurora*, 2000 U.S. Dist. LEXIS 5708; *Ostergren v. Village of Oak Lawn*, 125 F. Supp. 2d 312 (N.D. Ill. 2000); *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 (N.D. Ill. 2000). In contrast, plaintiffs have actually sought compensation in state court, and the state court dismissed their claim.

In *Williamson County*, the Court observed that "no constitutional violation occurs until just compensation has been denied," which therefore obligates the "property

owner [to] utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 194 n.13. Illinois law provides for inverse condemnation actions, which allow a landowner to recover compensation for a taking of his property in the absence of condemnation proceedings. *Lamar Whiteco Outdoor Corp. v. City of Chicago*, 355 Ill. App. 3d 352, 823 N.E.2d 610, 622, 291 Ill. Dec. 318 (Ill. App. 2d Dist. 2005). Section 735 ILCS 5/7-101 establishes the procedures for recovering compensation for the taking of property. Section 5/7-101 specifically focuses on trial procedures when it requires compensation to be ascertained by a jury, unless waived. The statute contains no provisions specifying necessary appellate procedures. Neither party claims that the circuit court's summary judgment order is non-appealable. Defendant cites IL Sup. Ct. R. 301, which states that "an appeal in a continuation of the proceeding," but this does not indicate that *Williamson County* compels mandatory appeals. To the contrary, a case is ripe after compensation has been sought and denied after utilizing "available avenues of state judicial review." *Wisconsin Cent. Ltd. v. Public Service Com'n of Wisconsin*, 95 F.3d 1359, 1369 (7th Cir. 1996).

We conclude that because appellate review is an available avenue of state judicial review, a plaintiff does not satisfy the exhaustion requirement until such review is sought. The word "available" often precedes "review" or

"remedies" in the cases. *See, e.g., SGB Fin. Servs. v. Consolidated City of Indianapolis-Marion County*, 235 F.3d 1036, 1037 (7th Cir. 2000); *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1003-04 (7th Cir. 2004). Requiring all "available" resources to be used strongly suggests that a plaintiff has not exhausted state remedies after losing at the trial level. Further, permitting plaintiffs to seek federal review prior to pursuing state appellate review short-circuits *Williamson County's* exhaustion requirement and would allow a litigant who prefers federal court to obtain an adverse judgment in state court posthaste. Such a ruling could also provide incentives for litigants to withhold arguments in order to avoid the effect of *res judicata* in federal court. Moreover, if the appellate court were to rule in plaintiffs' favor, there would be no case or controversy for this court to adjudicate. *See, Sprint Spectrum*, 361 F.3d at 1004. The message of *Williamson County* is that in takings cases, litigants must avail themselves to state procedures, except if those procedures are unavailable or inadequate. We turn now to the parties' arguments concerning the futility of appellate review.

According to plaintiffs, an appeal of the circuit court's ruling would be futile because under Illinois law land is not taken when it is only subjected to intermittent, as opposed to permanent flooding. Plaintiffs concede that defendant's construction projects have caused only intermittent flooding, and thus claim that they will never

recover under state law. In response, defendant states that inverse condemnation proceedings are adequate and available, and *Williamson County's* exhaustion prong requires that plaintiffs appeal, despite their predictions of sure defeat.

In Daniels, the plaintiff sought an injunction in federal court prior to first seeking relief in state court. The court excused the plaintiff from exhausting state court remedies because the plaintiff could only obtain monetary damages through the state inverse condemnation proceedings. It would have been futile for the plaintiff to seek injunctive relief in state court when that remedy was unavailable. *Daniels*, 306 F.3d at 456. Unlike the scenario depicted in *Daniels*, no state statute precludes plaintiffs from recovering for the alleged taking. Plaintiffs only claim that they cannot obtain damages due to adverse case law. In *Daniels*, for the plaintiff to obtain injunctive relief in state court would have required the judicial nullification of a legislative act. Here, plaintiffs need only seek to distinguish prior case law. The futility analysis often focuses on the inadequacy or availability of procedures, and plaintiffs do not identify any procedures from the inverse condemnation proceeding that are inadequate. *See Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002) ("If a state provides adequate procedures for seeking just compensation, a property owner cannot state a claim under federal law until

he has used those procedures and been denied compensation."). Plaintiffs are not barred from arguing that they are entitled to compensation.

As the plaintiffs argue here, in *SGB*, *supra,* the plaintiff argued that, based on prior state court decisions, the state courts would not entertain the argument it intended to make, and that pursuing a state court action was consequently futile. The court rejected that argument and held that the *Williamson County* exhaustion requirement does not turn on a plaintiff's expectation of success. *SGB*, 235 F.3d at 1038 ("State remedies do not become unavailable just because resort to them may fail."). Plaintiffs argue that *SGB* is distinguishable because the plaintiff there completely bypassed state court, whereas plaintiffs say their fruitless state court litigation supports their declaration of futility. The logic of *SGB*, however, would not permit a plaintiff who lost in state court, at the trial level, to take his case to federal court; it noted that plaintiffs cannot declare state remedies "futile ex ante, without ever being tried." *Id.* As discussed above, we believe exhaustion of remedies requires appealing an adverse trial court decision. We would have a different case if the circuit court's summary judgment ruling involved the application of a statutory rule in a manner that is not open to dispute. But the circuit court's ruling turned on interpretation of facts and law, and that decision is not a bar that "would block all consideration of a claim." *Id.* at

1039.

On appeal, plaintiffs could argue that the cases that the circuit court relied on do not set forth a "permanent standing water" requirement, as the circuit court concluded (*see* def. ex. B at 7). Plaintiffs could contend that when cultivatable land is transformed into land that is "permanently wet enough to be designated wetlands" (def. ex. B at 7), the water "permanently inundates" in a manner that has been held to be "a physical invasion tantamount to a taking." *Luperini v. County of DuPage*, 265 Ill. App. 3d 84, 637 N.E.2d 1264, 1268, 202 Ill. Dec. 528 (Ill. App. 2d Dist. 1994). *Luperini* was the primary focus of the circuit court's analysis. Indeed, the circuit court only cited *Luperini* and one other case on which *Luperini* relied.

The land in *Luperini* was subjected to intermittent flooding after an adjacent construction project; however, prior to the completion of that project portions of the land experienced flooding, and the court identified a cause independent of the construction project that contributed to the flooding. Here, the limited record shows that plaintiffs' land was cultivatable, but now is classifiable as wetlands.

Also, the record does not disclose an alternate source of flooding. A takings analysis involving flooding is ultimately a question of degree (*Winnebago County v. Kennedy*, 60 Ill. App. 2d 408, 208 N.E.2d 612 (Ill. App. 2d

Dist. 1968)), not an inflexible doctrine that precludes all review once it is discovered that the subject land is not lost under several feet of water.

We offer these observations not to cast doubt on the circuit court's decision (the evaluation of which is for the Illinois Appellate Court), but, instead, to illustrate why we disagree with plaintiffs' declaration of futility. The appellate court has discretion to find that a taking has occurred, and *Luperini* does not indicate that the appellate court has "dug in its heels" and made clear that it would reject plaintiffs' claim. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 3[4]2, 349 (2d Cir. 2005). There is thus a state court to hear plaintiffs' arguments, and that plaintiffs may lose on the merits is "neither here nor there." *Id.* at 1039; *see also Greenfield Mills*, 361 F.3d at 958; *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988). This case is not ripe because if the appellate court decided that a compensable taking occurred, then there would be no basis for relief under section 1983, and no case or controversy. *SGB*, 235 F.3d at 1038.

We observe that plaintiffs may raise their federal claims in state court. It is not clear whether they have actually done so. The Supreme Court recently reaffirmed the ability of state courts to entertain federal constitutional claims in *San Remo Hotel v. County of San Francisco*, 125 S. Ct. 2491, 2506 (2005). In *San Remo*, the Court held that

in takings cases that are first raised in state court under *Williamson County*, federal courts must afford state court decisions full faith and credit under 28 U.S.C. § 1738. A party cannot avoid the full faith and credit clause by reserving federal claims for litigation in federal court. The *San Remo* decision affirms that despite the preclusive effect that a state court decision may have on a future federal case,[2] plaintiffs must still first seek compensation in state courts. In addition to the full faith and credit clause, the Rooker-Feldman doctrine may also block a federal claim. *See San Remo*, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring); *Zealy v. City of Waukesha*, 153 F. Supp. 2d 970, 980 (E.D. Wis. 2001). Again, it is not clear whether plaintiffs raised their federal claims in state court, but in light of *San Remo*, failing to raise those claims may preclude future consideration in federal court. We offer these points here only because they appear central to this case, and they were absent in the parties' memoranda.

In sum, plaintiffs' case is not ripe for federal review because plaintiffs have not satisfied *Williamson County's* exhaustion requirement. Having found the case is not ripe,

---

[2] This catch-22 has been described as the "*Williamson* trap." *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 n.3 (6th Cir. 2004); Madeline J. Meacham, *The* Williamson *Trap*, 32 Urb. Law. 239 (2000).

we do not reach the abstention and venue arguments.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted.

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

December 29, 2005.

United States District Court,
Northern District of Illinois,
Eastern Division
No. 05 C 4485

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendant.

JUDGMENT IN A CIVIL CASE

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- ■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion to dismiss the action under Fed.R.Civ.P. 12(b)(6) is granted.

Michael W. Dobbins, Clerk of the Court
s/ Linda Garth, Deputy Clerk
Linda Garth

Date: 12/29/2005

APPENDIX C

Nineteenth Judicial Circuit Court, McHenry County, Illinois

No. 96 CH 297

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *et al.*,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
Defendants.

July 27, 2005

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause has been before the Court on the Motion of Defendants, City of Crystal Lake and Union Pacific Railroad, for Partial Summary Judgment as to Counts IV and V of Plaintiffs' Second Amended Complaint which seeks relief on the basis of inverse condemnation theory.

This litigation has a long and complicated history, but the position taken by the Defendant's in this current motion is quite simply stated on page 2 of the motion:

> "..., as a matter of law, Plaintiffs' inverse condemnation action fails as (1) the Plaintiffs can never establish the primary element of that form of relief - a permanent taking, and (2) that the action was untimely filed."

The Court has reviewed the Defendants' Motion for Partial Summary Judgment, Plaintiffs Response to said Motion and Defendants' Reply. The Court has also reviewed the other written materials submitted which, among other things, included statements of facts and counter statements of facts, deposition excerpts, affidavits, pleadings, court transcripts, discovery responses, photographs and a video tape. The Court has reviewed the citations to legal authorities. The Court has heard the oral arguments presented.

The Court will not recite the underlying facts of the case because the facts are well known to the parties and are not in serious dispute in the context of the present motion. The seemingly simple issue before the Court is whether or not the Plaintiffs have presented sufficient evidence in this case to prove an essential element of their claim - that the facts of this case establish that there has been a taking of

property without just compensation.

The issue in the Motion for Summary Judgment can be resolved by reference to the relatively recent Second Appellate District case of *Luperini vs. County of DuPage*, 265 Ill. App. 3d 84 (2nd Dist. 1994).

In *Luperini, supra*, the Plaintiffs-Property Owners brought a Complaint for Mandamus seeking to compel the institution of condemnation proceedings because the Defendants had installed a storm water sewer line on adjacent property that caused a diversion of run off water onto their property resulting in a physical invasion of their property which was tantamount to a constitutional taking. The facts of the *Luperini* case have certain similarities to the facts in the case now before this Court, but the circumstances are not totally the same.

In *Luperini, supra*, at pages 88-89, the Appellate Court summarized the facts of the case as follows:

> 'The facts material to this determination are not disputed. Sometime in either 1983 or 1987 a storm sewer pipe was installed near plaintiffs' property in order to alleviate occasional flooding of a housing subdivision to the south of the subject property. As a consequence of the storm sewer installation, storm water runoff was diverted onto and across

> plaintiffs' property, which resulted in flooding of plaintiffs' house, garage, and basement. Additionally, when it rains, the Sawmill Creek backs up causing flooding on plaintiffs' property.
>
> The flooding has caused a proliferation of wetland vegetation and an increase in size of the floodplain on plaintiff's property. There was no evidence, however, that the flooding caused a permanent accumulation of water on plaintiffs' property, and some evidence was presented to suggest that plaintiffs' property had been subject to occasional flooding prior to the storm sewer being installed and that an undefined portion of the property was previously classified as jurisdictional wetlands."

Further, in *Luperini, supra,* at page 89 the Appellate Court specifically discusses the analysis of takings involving inundation with water resulting from the construction of public improvements:

> 'Where an adjacent or abutting landowner is inundated with water resulting from the construction of a public improvement, the question of whether a taking has occurred turns on the temporal nature of the inundation. (See generally *Herget National Bank v. Kenney* (1985), 105 Ill. 2d 405; *Pratt*, 399 Ill. at 251) Where the public

improvement causes only temporary accumulations of water on the subject property, a taking has not occurred. (*Pratt*, 399 Ill. at 252.) In contrast, where water occasioned from the construction of a public improvement permanently inundates the subject property, it has been held that a physical invasion tantamount to a taking has occurred. *Herget*, 105 Ill. 2d at 410."

Further, in *Luperini*, *supra*, at page 90, the Appellate Court found in that case as follows:

"The undisputed facts of the present case are controlled by *Pratt*. Although the deposition excerpts attached to plaintiffs' response and motion allow for a reasonable inference that each time it rained their house, garage and basement were damaged because of flooding, there is no evidence that the accumulations of water were permanent. Furthermore, the evidence did not establish that plaintiffs were prevented from the use of their premises because of permanent accumulations of water. In his August 22 letter, plaintiffs' expert nowhere stated that plaintiffs were prevented from the use of their property resulting from permanent accumulations of water. Instead, he stated that "[t]he sustained length of time and increased rate of flow in the channels that cross the property will

> greatly increase the costs and difficulty involved in maximizing the productivity of the property." Furthermore, plaintiffs' expert expressed his view that the erosion and sediment accumulation in the Sawmill Creek and the water diversion resulting from the sewer pipe installation could be corrected through excavation and the provision of a covered conduit conveyance system, which would eliminate the conditions conducive to the formation of wetlands vegetation."

As mentioned in the previous quotation, the Appellate Court in *Luperini, supra*, at page 90 relied on the Illinois Supreme Court Decision in *People ex rel Pratt vs. Rosenfield*, 399 Ill. 247 (1948) as a precedent upon which to base its decision concerning what constitutes a physical taking of property. In *Pratt, supra*, at page 252, the Illinois Supreme Court stated:

> "As to whether the alleged damages are such as to amount to a physical taking of property, we note the allegations that surface waters run into the buildings and make them unfit for the uses to which they are now devoted and will damage or destroy valuable equipment, machinery and supplies therein; that it will be necessary to change the floor levels and that because of the materials of which the buildings are constructed the change of floor levels will require large expenditures of money. It

is not alleged that these waters accumulate and remain on the premises and thereby prevent the use thereof, but it is claimed that by reason of their running into the buildings the damages are occasioned. Running surface waters are not constantly present but are temporary and come as a result of rain or snow."

In summary, this Court believes Defendants position in this motion to be that Plaintiff cannot establish a permanent physical taking of its property because Plaintiffs cannot establish permanent surface water, either standing or running on the property, as required by the *Pratt* decision, *supra* and adopted by the Second District Appellate Court in *Luperini, supra*. The Plaintiffs concede and, in fact, state that it was never their contention, that Defendants have caused permanent standing water on their property.

The Plaintiffs claim that the actions of the Defendants have caused their property to be permanently inundated with water.

In an affidavit entitled "Supplemental Declaration of First E. John Schumacher", the Plaintiffs' expert witness, Mr. Schumacher states as follows:

"6. I have reexamined my report and the same

documentary material in preparation for an inspection of the property at issue in this case which I conducted on February 20, 2005.

7. At that time, I found that it is obvious that in the past five years that the hydrology has changed even more drastically over the intervening five years so that the ground remains permanently inundated with water, although to more or less degrees depending on the weather and other conditions.

8. It is my opinion, to a reasonable degree of engineering certainty, that the Geske property has been permanently altered so that it is permanently inundated with water, although to varying degrees, that the water accumulate and remain on the Geske property and in the soil, and that the wetlands present on the land are permanently and continually wet. The direct and immediate, though slowly manifesting, cause of this change is the gradual effect of the 1994 construction and modification of the City's holding ponds directly adjacent to the property which has altered the water table of the land surrounding the ponds,

including the Geske property, so that it is now continually saturated and inundated with water. This change has occurred since my original work in 1999 and Report in 2000."

In his deposition taken on May 16, 2005, E. John Schumacher at page 55 beginning on line 21 and through page 56 line 12, was asked these questions by Defendants attorney and gave these answers.

"Though there are periods when there is standing water and there are periods when there's not standing water, we don't know how frequently that the case that there's standing water versus non-standing water at least as you sit here today given the breadth of your assignment?

A. That's correct.

Q. But there's little doubt in your mind that the soils are wet enough to still permit for the designation of wetlands or –

A. That's my opinion.

Q. And that's not changed, there's continually – they're going to be permanently wet

enough to support the definition of wetlands?

A. Under the existing conditions, yes."

On page 57 of his deposition on lines 15 through 21, Schumacher was asked these questions by the attorney for the Plaintiffs and Schumacher gave these answers:

"Q. That the property has been permanently changed so it is continually wet; right?

A. Correct.

Q. And what you don't know is whether or not the water is standing on there all the time; right?

A. Correct."

Also, in the deposition of E. John Schumacher; beginning on page 32 at line 23 and ending on page 33 at line 20, the following questions by Defendants attorney and the following answers were given by Mr. Schumacher:

"Q. What is your definition of inundation, John? Is that a term of art or just a – in your

business or –

A. Just a general definition?

Q. Yeah.

A. Inundation is when the surface is covered with water.

Q. Does inundation tell us anything about the time period that the surface is covered with water, you know, just the term inundation as you use it in your work?

A. No. It's a simple condition.

Q. For example, unlike wetlands, we know something about the time period of a condition known as wetlands because you know it takes a long time to get to that point; right?

A. Yes.

Q. Okay. But the term in your business of inundation doesn't mean anything about – there's no temporal component to inundation, it's just a stated condition at a

time given?

A. That's correct."

Also in the deposition of E. John Schumacher beginning on page 39 line 7 through page 40 at line 8, the following questions were asked by the Defendants' attorney and the following answers were given by Mr. Schumacher:

"Q. So when you say that on the 27th of February '05 at around 8:00 a.m. there was a quarter to 3/16 inch of ice, you don't know one way or the other whether that ice or the water equivalent was present for any period of time thereafter? I mean, I'm going to say month, but you can't even tell me the next day; is that fair to say?

Mr. Gekas: Well, you asked him that now at least twice, but go ahead and answer it, John.

BY THE WITNESS :

A. No, there is no way of knowing.

BY MR. ANDREWS :

Q. So you don't know if that standing water –

evidence of standing water you saw on the half acre to an acre was temporary, sporadic, permanent or any other adverb you care to use, but you just know it was there that one day?

A. That's right.
Q. You don't know if it was permanent; correct?

A. That's correct."

Although in paragraph 7 of his Supplemental Declaration, Mr. Schumacher stated that the ground remains permanently inundated with water" and further on page 33 of his deposition Mr. Schumacher stated that "inundation is when the surface is covered with water", it is clear from reading the entirety of Mr. Schumacher's deposition testimony and his Supplemental Declaration and, frankly as conceded by the Plaintiffs, that the Plaintiffs evidence does not establish permanent standing water on their property caused by the public improvement in this case. Taken in the light most favorable to the Plaintiffs, the evidence establishes soils that are permanently wet enough to be designated wetlands and, that on occasion there is standing water on the property.

Although this Court believes it creates a harsh

result, it appears that the current state of the law in the State of Illinois requires that there must be evidence of permanent surface water on property caused by the public improvement before a finding can be made that a physical invasion tantamount to a taking has occurred. The Plaintiffs have not and cannot present such evidence in this case.

Based upon the foregoing, this Court finds that the Defendants Partial Motion for Summary Judgment as to Counts IV and V of the Second Amended Complaint should be granted on the basis that the Plaintiffs can never establish under the current law that there is a permanent taking.

As to the Defendants second point in the Motion for Partial Summary Judgment, the Court believes that there is a genuine issue of material fact as to the timeliness of the cause of action and the Court will not grant the Partial Motion for Summary Judgment on that basis.

THEREFORE, IT IS ORDERED:

1. Defendants Motion for Partial Summary Judgment as to Counts IV and V of the Second Amended Complaint is granted.

2. Judgment is entered on Count IV and V of

the Second Amended Complaint in favor of the Defendants and against the Plaintiffs.

3. The cause is continued for status on the remaining Counts to August 19, 2005 at 9:00 am. without further notice.

ENTERED July 27, 2005 ENTERED s/ Michael Sullivan

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on July 23, 2005.

s/ Joyce Brady

APPENDIX D

Nineteenth Judicial Circuit Court, McHenry County, Illinois

No. 96 CH 297

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON, *et al.*,
Plaintiffs,

v.

CITY OF CRYSTAL LAKE, a municipal corporation,
*Defendant*s.

July 14, 2004

ORDER ON PENDING MOTIONS

This cause was before the Court on four Motions for Summary Judgment and Motion to Amend. This Motion's for Summary Judgment listed by date of filing are:

1. Motion for Summary Judgment filed by the City of Crystal Lake, a Municipal Corporation on December 12, 2003 and based upon the following arguments:

   a. Plaintiffs' Claim four Damages is barred by application of the one year limitations period of Section 8-101 of the Tort Immunity Act (745 ILCS 10/8-101).

   b. Plaintiffs' Claim for Injunctive Relief is barred by *laches*.

   c. Plaintiffs' Claim for Damages is barred by application of the immunity provisions of Section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201), Section 3-103 of the Tort Immunity Act (745 ILCS 10/3-103) and Section 2-105 of the Tort Immunity Act (745 ILCS 10/2-105).

   d. Plaintiffs have failed to produce competent evidence of any damage.

2. Plaintiffs partial Motion for Summary

Judgment filed on March 8, 2004 seeking partial Summary Judgment on the City of Crystal Lake's affirmative defenses of statute of limitation and *laches*.

3. Motion for Partial Summary Judgment against railroad Defendant on its limitations and *laches* defenses against both Defendants on causation filed on April 26, 2004.

4. Defendant, Chicago Northwestern Railway Company's Motion for Summary Judgment filed June 21, 2004 which is based upon the following arguments:

   a. The railroad is entitled to possession of the affected land under the Doctrine of Adverse Possession and/or is entitled to continue to use the same land under the Doctrine of Prescriptive Easement.

   b. Plaintiff's Claim for Damages is barred by the statute of limitations.

   c. Plaintiff's Claim for Injunctive Relief is barred by the Doctrine of *Laches*.

5. Plaintiffs' Motion for Leave to File Second Amended Complaint and for Substitution of Parties filed Mach 12, 2004.

The parties have presented substantial written materials in support of or in opposition to the various motions. The Court will not list these materials but the Court does acknowledge receipt of the materials and has reviewed and considered same. The Court has also heard and considered oral arguments by counsel. The Court has further reviewed and considered the relevant statutory and case law citations presented by the parties.

This cause was filed by the Plaintiffs on October 19, 1994 as Case Number 94 CH 9413 in the Circuit Court of Cook County and transferred to the Circuit Court of McHenry County on August 14, 1996 as Case Number 96 CH 297. On March 14, 1997, an Amended Complaint was filed.

The Court will not attempt to recite all the factual materials presented in the respective statements of fact and responses thereto as the facts are contained in the written materials and are well known to the parties. The Court will make such reference to factual materials as is necessary to an understanding of this Order.

In 1968, the City of Crystal Lake installed a 36 inch

storm sewer pipeline in the Chicago Northwestern Railway Company right of way. This right of way is immediately adjacent to and contiguous with the Northwestern boundary of the Plaintiffs property. The Plaintiffs' claim that the actions of the City of Crystal Lake and the Chicago Northwestern Railway Company in constructing and maintaining the pipeline and the City by other activities on its property have cut off the natural flow of water off, across and around the Plaintiffs property and thereby caused substantial and continuing damages to Plaintiffs property.

After having considered all of the written submissions, oral arguments and citations of statutory and case law authorities, the Court will discuss its rulings as to each motion separately.

1. Motion for Summary Judgment filed by City of Crystal Lake, a Municipal Corporation, on December 12, 2004.

   The Court finds that the City of Crystal Lake has met its burden to establish that it is entitled to summary judgment on the basis of immunity under Section 2-201 of the Tort Immunity as to Plaintiffs damage claims. The Court comes to this conclusion based upon the method of analysis as set forth by

the Illinois Supreme Court in *Ven Meter vs. Darien Park District*, 207 Ill. 2nd 359 (2003). This Court finds that the City of Crystal Lake has presented sufficient support in the record to establish the City's action in this case were (1) the result of a policy decision and (2) discretionary. Based upon this immunity, the Court finds that the Plaintiffs Claim for Damages against the City of Crystal Lake is barred. The Court does not find that the Illinois Supreme Court Decision in *Snyder vs. Curran Township*, 167 Ill. 2nd 466 (1995) is inconsistent with a finding of immunity under the facts of this case.

The Court further finds that the city has not met its burden to establish that it is entitled to Summary Judgment on the basis of immunity under either Section 3-103 or Section 2-105 of the Tort Immunity Act in the circumstances of this case.

With regard to the City's argument that the one year statute of limitation of Section 8-101 of the Tort Immunity Act controls, the Court finds that *Zimmer vs. Village of Willowbrook*, 242 Ill. App. 3d 437 (2nd Dist.,

1993) is still good law and controls in the Second Appellate District. This Court does not believe that the ruling of the Illinois Supreme Court in *Tosado vs. Miller*, 188 Ill. 2nd 186 (1999) in any way impairs the validity of the *Zimmer* decision.

As to the City's argument that the Plaintiffs' Action for Injunctive Relief is barred by the Doctrine of *Laches*, the Court finds that the City has failed its burden of proof necessary to establish the Plaintiffs failed to bring their cause of action for injunctive relief within the 20 year limitation period recognized by the Illinois Supreme Court in *Meyers vs. Kissner*, 149 Ill. 2nd 1 (1992). The Court believes that a question of fact exists as to whether the Plaintiffs claim arises from a single overt act as alleged by the city or from a continuing nuisance from which claimant may select his own time to bring an action.

As to the damage issue, the Court finds that the Plaintiffs' evidence is sufficient to overcome the request for summary judgment.

2. Plaintiff's Motion for Partial Summary Judgment filed on March 8, 2004 seeking Summary Judgment on the City of Crystal Lake's Affirmative Defenses of Statutes of Limitations and *Laches*.

   While the Court has not granted the City's Motion for Summary Judgment on either the statute of limitations or *laches* bases, the Court does believe there are genuine issues of material fact in existence in this case that also require the Plaintiffs' motion to be denied as to the statute of limitations and *laches* affirmative defenses.

3. Motion for Partial Summary Judgment against the railroad defendant on its limitations and *laches* defenses and against both defendants on causation filed April 26, 2004.

   For the same reasons stated above, the Court will not grant the Plaintiffs' Partial Motion for Summary Judgment as to the railroad defendant on the affirmative defenses. On Plaintiffs' motion as it relates to causation, the Court finds the record establishes there is a genuine issue of material fact as to the

causation in this matter. The credibility and weight to be given to the two opinion witnesses in this case is of great importance in this case. If the trier of fact accepts the testimony of the Defendants' witness as to the deficits in the Plaintiffs' opinion expert's analysis and the lack of necessary information upon which to base any opinion, the ability of the Plaintiffs to meet their burden of proof on the issue of causation is in doubt.

4. Defendant, Chicago Northwestern Railway Company's Motion for Summary Judgment filed June 21, 2004.

The Court finds that the Defendant railroad has not established that it is entitled to Summary Judgment on the bases of either adverse possession or prescriptive easement.

Additionally, for the same reasons previously stated in regard to the Motion of the City of Crystal Lake, the Court finds that the Defendant railroad is not entitled to Summary Judgment on the bases of either statute of limitations or *laches*.

5. Plaintiffs' Motion for Leave to File Second Amended Complaint and for Substitution of Parties filed March 12, 2004.

   The Court will grant the Motion of the Plaintiffs for Leave to File a Second Amended Complaint and for Substitution of Parties without prejudice to the Defendants ability to file any appropriate responsive pleading.

THEREFORE, IT IS ORDERED THAT:

1. The Motion of the City of Crystal Lake for Summary Judgment as to Plaintiffs' damage claim is granted on the basis of immunity granted by 745 ILCS 10/201 and that Plaintiffs claim for damages against the City of Crystal Lake is dismissed.

2. The Motion of the City of Crystal Lake for Summary Judgment on the bases of immunity under 745 ILCS 10/3-103 and 10/2-105, limitations under 745 ILCS 10/8-101 or *laches* is denied.

3. Both of Plaintiffs' Partial Motions for Summary Judgment are denied.

4. Defendant, Chicago and Northwestern Railroad Company's Motion for Summary Judgment is denied.

5. Plaintiff is granted leave to file their Second Amended Complaint adding additional counts and substituting parties within seven days of this Order and Defendant's are granted 21 days to answer or otherwise plead to the Second Amended Complaint.

6. The case is set for a case management hearing on August 27, 2004 at 9:00 a.m.

ENTERED July 14, 2004 ENTER s/ Michael Sullivan
Michael J. Sullivan
CIRCUIT JUDGE

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on July 14, 2004.

s/ Joyce Brady